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No. 84-1912

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRED E. LANGENEGGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable under the Just Compensation Clause of the Fifth Amendment for the expropriation of a coffee plantation in El Salvador by the Government of El Salvador as part of a large-scale agrarian reform plan adopted in 1980.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 756 F.2d 1565. The opinion of the United States Claims Court (Pet. App. 18a-32a) is reported at 5 Cl. Ct. 229.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a) was entered on March 12, 1985. The petition for a writ of certiorari was filed on June 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners contend that the United States must pay compensation to them for the value of their interests in a coffee plantation located in El Salvador that was expropriated by the Government of El Salvador as part of an agrarian reform program adopted in 1980. The United

States Claims Court granted summary judgment for the United States (Pet. App. 18a-32a), and the court of appeals affirmed (*id.* at 1a-17a).

1. Petitioners are six United States citizens, each of whom claims an undivided one-tenth interest in a large coffee plantation of approximately 4,500 acres (1,822.5 hectares) located in El Salvador and known as Las Lahas. Petitioners derive their ownership through inheritance from Blanca Rosa Langenegger, a Salvadoran national who died in 1978. Pet. App. 2a, 18a, 35a-36a.

During the 1970s, El Salvador experienced increasing political instability and violence. On October 15, 1979, a group of Salvadoran military officers staged a coup d'etat and established a Revolutionary Junta comprised of both civilian and military officials. The new government promised a program of economic, social, and political change, including reform in the areas of agriculture, banking, foreign commerce, labor, and human rights. The United States continued diplomatic relations with the Revolutionary Junta as the sovereign Government of El Salvador and announced its support for the reform program. Pet. App. 2a-3a, 19a, 27a.

On December 7, 1979, as a first step toward agrarian reform, the Government of El Salvador promulgated Decree No. 43, which prohibited the transfer of agricultural lands in excess of 100 hectares (Pet. App. 2a-3a, 19a). During the following months, the new Government of El Salvador made little progress in reform, and violence and urban demonstrations escalated. In the United States, there was increasing concern that the Government of El Salvador was in danger of collapse and might suffer a Marxist takeover. The United States strongly supported enactment of reform measures in El Salvador in order to bring about political stability, and the United States offered economic

and military assistance to the Salvadoran Government. Pet. App. 3a, 19a.

On March 6, 1980, the Government of El Salvador promulgated Decree No. 153, the Basic Law of Agrarian Reform, which established a three-phase program.[1] Phase I, at issue here, provided for expropriation of all agricultural estates in excess of 500 hectares (1,235 acres) and conversion of such estates into cooperatives run by agricultural laborers.[2] In Phase I, which was largely completed by the end of July 1980, the Government of El Salvador expropriated the largest agricultural landholdings in the country: 328 estates containing 12% of all cropland. Decree No. 153 provided that owners of estates taken under Phase I would be compensated by the issuance of agrarian reform bonds, a common form of compensation in land reform programs. Pet. App. 3a, 19a; Prosterman Aff. paras. 9, 10, 24 & Exh. A; Def. App. 18, 22-24.

On March 7, 1980, the Government of El Salvador took possession of Las Lahas pursuant to Phase I of the agrarian reform program. Petitioners concede that the seizure was accomplished by personnel of the Salvadoran military or police, acting pursuant to Decree No. 153. At that time, record title to Las Lahas was in the name of Blanca Rosa Langenegger, a Salvadoran national.[3] Petitioners have not alleged that the United States took possession of or received

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[1]Shortly thereafter, the Government of El Salvador also adopted banking and foreign commerce reforms. Cheek Aff. para. 5; Def. App. 10.

[2]Phase II of the agrarian reform contemplates expropriation of medium-sized estates of between 247 and 1,235 acres. Phase III, known as "land-to-the-tillers," provides for transfer of ownership of land farmed by tenants or sharecroppers to the person farming the land. Prosterman Aff. para. 8; Def. App. 17-18.

[3]Plaintiffs' Answer to Defendant's Interrogatory No. 5, at 28; Def. App. 28.

a direct interest in the property, and they admit that it was used exclusively by the beneficiaries of the Salvadoran agrarian reform program. Pet. App. 22a, 38a. Petitioners also have not disputed that they have not applied to the Government of El Salvador for compensation for their land.[4]

2. Petitioners filed this action on February 26, 1981 to recover the value of their interests in Las Lahas. They contended that the expropriation of Las Lahas constituted a taking of their property by the United States without just compensation, in violation of the Fifth Amendment (Pet. App. 43a-45a).[5] Petitioners alleged that Las Lahas was taken "as a direct and effective result of the actions and

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[4]See Defendant's Proposed Findings of Uncontroverted Fact and Proposed Conclusions of Law para. 9; Appellee's Br. 2 n.2, 29.

[5]Petitioners also alleged that the taking of Las Lahas was not for a "public purpose" within the meaning of the Just Compensation Clause of the Fifth Amendment and that it therefore deprived them of their property in violation of the Due Process Clause (Pet. App. 45a-46a); that the United States violated 22 U.S.C. 2370(e)(1) by failing to terminate foreign assistance to the Government of El Salvador because of the latter's alleged failure to pay compensation (Pet. App. 46a-47a); and that the United States had effectively extinguished petitioners' claim against El Salvador under international law (*id.* at 47a-48a). The Claims Court rejected the first two of these additional claims on the ground that neither the Due Process Clause nor 22 U.S.C. 2370(e)(1) mandates the payment of compensation for a violation and that neither therefore can give rise to an award of money damages under the Tucker Act (Pet. App. 31a). Petitioners did not appeal those rulings by the Claims Court, and they are not at issue here.

The Claims Court also granted summary judgment in favor of the United States on petitioners' claim that the United States had extinguished their claim against El Salvador under international law (Pet. App. 30a-31a). However, the court of appeals directed that this claim be dismissed without prejudice, concluding that an international forum is available for determination of petitioners' claim against El Salvador (*id.* at 15a-17a). Petitioners have not sought review in this Court of that aspect of the judgment below.

directives" of the United States (*id.* at 35a); that the United States "was directly responsible for the preparation, adoption, and implementation of Decree No. 153" (*id.* at 38a); and that the United States "drafted and paid for the preparation of Decree No. 153," "persuaded and pressured [the Government of El Salvador] to promulgate such decree under direct threat of political and economic sanctions (including the termination of U.S. economic and military assistance)," and "paid for and assisted in the implementation of [Decree No. 153] and the resultant expropriation of Las Lahas" (*id.* at 39a).

The Claims Court granted the United States' motion for summary judgment (Pet. App. 18a-32a).[6] In the Claims Court's view, the United States may be held liable for a taking by a foreign government only if authorized agents of the United States participated in the foreign government's action and the United States derived a direct benefit from that action (*id.* at 21a-22a). The court concluded that that standard had not been met in this case (*id.* at 22a). It found that the seizure of Las Lahas was carried out by the Government of El Salvador pursuant to an official decree of that Government, and that the property was used exclusively by El Salvador. By contrast, the court observed, there is no allegation that the United States received any direct interest in the land. The court further explained that even if it were persuaded that the United States received certain collateral benefits from the Salvadoran land reform program, in the form of increased stability in the country and

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[6]The United States moved for summary judgment on the basis of sworn affidavits and answers to interrogatories. Pursuant to a pretrial order entered by the Claims Court, the United States filed a detailed statement of proposed uncontroverted facts, to which petitioners responded. The pretrial order "deem[ed] the material facts claimed and adequately supported by the moving party to be established except to the extent that such material facts * * * are controverted by affidavit or other written or oral evidence." See also Cl. Ct. R. 56(e).

the region, "those benefits are so remote as not to support a taking claim" (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1a-17a). It agreed with the Claims Court that, under applicable precedent, a court in a case such as this must consider both the nature of the United States' activity and the benefit the United States has derived from the action occurring on foreign soil (*id.* at 10a-13a). In particular, the court reasoned that "[w]here the actual expropriation is by the hand of a foreign sovereign, the United States cannot be held responsible merely because its activity is that of 'friendly' persuasion regarding general policy, common among allies, or when the sole benefit to the United States is the political stability of its neighbors" (*id.* at 13a). Applying these principles to the circumstances of this case, the court concluded that the alleged benefit to the United States of hemispheric stability was only "incidental" to the expropriation, and "[t]he expropriation by the foreign sovereign's legislation was for the benefit of that country's national interest as perceived by [its] national leaders, and was not for the United States' public benefit" (*id.* at 14a).[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, petitioners' contention,

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[7]The court of appeals reversed the Claims Court's holding (Pet. App. 24a-29a) that petitioners' taking claim raised non-justiciable political questions. See *id.* at 4a-9a. The Claims Court had determined that there are no judicially discoverable and manageable standards by which to determine what influence the United States actually had on the Revolutionary Junta's decision to enact agrarian reform and that to attempt to resolve this issue would intrude the court into an area of foreign affairs committed to the political branches (*id.* at 24a-29a). The court of appeals, however, concluded that this suit involves only a land-taking claim, a subject traditionally resolved by the courts, and presents no occasion for second-guessing of foreign relations decisions by the Executive (*id.* at 7a-9a).

which they concede is "novel" and "has not previously been addressed directly by any federal court" (Pet. 9), does not warrant review by this Court.

1. The property in which petitioners claimed an interest is located in El Salvador. It was expropriated by officials of the Government of El Salvador, acting pursuant to a legislative decree of that Government. As the court of appeals held, and as petitioners do not dispute, the expropriation "was for the benefit of that country's national interest as perceived by the national leaders" (Pet. App. 14a). Petitioners do not question that El Salvador is an independent sovereign nation, recognized as such by the United States, and they accept that the expropriation was valid under Salvadoran law. See Pet. 6; Pet. App. 6a-7a. In these circumstances, the court of appeals was clearly correct in concluding that the taking of their property was by El Salvador, not by the United States.

a. As petitioners concede (Pet. 12), "[e]xcept where the United States is engaged in military operations in a foreign country, or acting as an occupying government, the United States normally has no jurisdiction or power to act directly against property in a foreign country." Instead, the power to expropriate or otherwise act directly against such property resides in the government of that country. There is no suggestion here that the United States possessed or exercised jurisdiction or power to expropriate the property in question in connection with military operations or as an occupying government in El Salvador. To the contrary, as we have said, petitioners do not question the independent sovereignty of El Salvador or the validity of the expropriation as part of that nation's program of agrarian reform. Thus, petitioners' argument founders at the outset by their failure to identify by what jurisdiction or power the United States may be said to have "taken" the property in El Salvador.

What is more, petitioners do not even premise their claim on the assertion that the United States in fact did seize the property. Compare *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149, 152 (1952) (no taking of plaintiff's facilities in the Philippines for a 14-day period during World War II, because there was no "assumption of actual physical or proprietary dominion over [the property] during this period"),[8] with *Seery* v. *United States*, 127 F. Supp. 601 (Ct. Cl. 1955) (United States must pay just compensation for property, owned by a United States citizen and situated in Austria, that was physically acquired by the Army for use as an officer's club). Their argument is that even though the United States did not actually expropriate the land, it should be deemed responsible for El Salvador's action in doing so (and should compensate petitioners for the full value of their interests in the property), because the United States allegedly engaged in diplomatic persuasion and offered financial inducements to encourage El Salvador to carry out the land reform program. It is not surprising that petitioners have offered no support for such an unprecedented result.

The Government of El Salvador is not a mere agent of the United States, such that its expropriation of land in El Salvador must be deemed the action of —and be attributed to — the United States. It is recognized by the Executive as the presiding sovereign within the territorial boundaries of the country, and that recognition is conclusive upon the courts. See *United States* v. *Belmont*, 301 U.S. 324, 328 (1937); *United States* v. *Pink*, 315 U.S. 203, 229 (1942).

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[8] In *Caltex*, the United States Army subsequently ordered destruction of the property to prevent its falling into the hands of the advancing Japanese troops. The Court held that the United States was not required to pay compensation even as of that time, because the "losses must be attributed solely to the fortunes of war, and not to the sovereign." 344 U.S. at 155-156 (footnote omitted).

Even if it is assumed that petitioners are correct in their allegations that the United States, through the Executive, engaged in diplomatic persuasion and offered substantial assistance to induce El Salvador to carry our the agrarian reform program, those circumstances would not make that program any less the sovereign act of the Government of El Salvador. The essential fact would remain that the responsible leaders of El Salvador determined that the agrarian reform program was in the national interest of that country.

Just as we must presume that the States within our federal system are capable of exercising independent judgment, even when motivated by economic inducements offered by the federal government (see, *e.g.*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589, 590 (1937); *United States* v. *Bekins*, 304 U.S. 27, 51-52 (1938)), so too the courts of this Nation must presume in the instant case that the responsible leaders of El Salvador were capable of and did exercise independent sovereign power in promulgating the reform measures, even if induced by the United States to do so. The act of state doctrine and related principles of nonjusticiability will not permit a court of the United States to question the bona fides of a foreign government when it purports to implement such a measure under its own authority. See, *e.g.*, *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 686, 691 nn.7-8 (1976); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). Accordingly, the courts below properly declined petitioner's invitation to look behind the expropriation carried out by the Government of El Salvador in order to find it to be an act of the United States.[9] See *Ramirez de Arellano* v. *Weinberger*,

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[9]In this respect, the act of state doctrine is related to principles of nonjusticiability under the political question doctrine. We therefore disagree with the court of appeals' holding (Pet. App. 4a-11a) that this dispute is justiciable. However, because the court of appeals correctly rejected petitioners' claim on the merits, the justiciability issues present no occasion for review by this Court.

745 F.2d 1500, 1572 (D.C. Cir. 1984) (en banc) (Starr, J., dissenting), vacated and remanded, No. 84-1398 (May 20, 1985).[10]

b. Petitioners contend (Pet. 18-20), however, that the decision below conflicts with the decisions of the Court of Claims in *Turney* v. *United States*, 115 F. Supp. 457 (Ct. Cl. 1953), and *Porter* v. *United States*, 496 F.2d 583 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975), which, in petitioners' view, established the proposition that "diplomatic pressure" can furnish the basis for finding the United States liable for a taking by a foreign government. This contention is without merit.

In *Turney*, the Government of the Philippines, at the request of the United States, embargoed the export of the plaintiff's property (classified military radar), thereby forcing the plaintiff to retain it at a military base, where it subsequently was "repossessed" by the United States. 115 F. Supp. at 463. The court found a taking by the United States, but held that "the taking occurred on October 13, 1947, when the Army officially took possession of the property," not on the date of the embargo imposed by the Philippines

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[10]Judge Starr's observations in *Ramirez* with respect to the judicial challenge to the United States' lending of assistance to the Regional Military Training Center (RMTC) in Honduras are relevant here as well (745 F.2d at 1572):

> Assuming that the majority does not wish to suggest that the United States simply invaded Honduras, its invitation to the parties to plumb the timing of and relative responsibilities for the establishment of the RMTC is a flagrant affront to the sovereignty of Honduras. Attempts by the parties to find "facts" with respect to these "issues" would in effect, question Honduran autonomy and raise the specter of a United States court declaring the government of an allied nation so subject to U.S. "manipulation" as to be incapable of independent sovereign acts worthy of deference under the act of state doctrine.

(July 30, 1947). *Id.* at 464.[11] *Turney* accordingly stands only for the unremarkable proposition that actual physical appropriation by the United States of property located abroad can be a taking by the United States. There was no such appropriation of the property by the United States in this case.

In *Porter*, the Court of Claims reaffirmed that a "key element" of the cases applying the Fifth Amendment to the taking of property located outside the United States "is that each concerned an alleged taking *by the United States*, regardless of where the property was located." 496 F.2d at 591 (emphasis in original). In *Porter* itself, the court held that the United States was not liable for an alleged taking based on acts of officials of the Trust Territory of the Pacific Islands, because those officials lacked authority to act on behalf of the United States. 496 F.2d at 591-592. This key element of a taking by the United States likewise is lacking here. The officials of the Government of El Salvador who implemented the expropriation decree, like the officials of the Trust Territory in *Porter*, did not purport to act on behalf of the United States and did not have the authority to do so. See also *Edison Sault Electric Co.* v. *United States*, 552 F.2d 326, 333 (Ct. Cl. 1977), discussing *Anglo-American Trading Corp.* v. *United States*, 109 Ct. Cl. 859 (1948) (United States not liable for trade embargo allegedly "induced" by the United States; "the Government does not become a principal to an action by suggesting that action to a third party, so long as the third party is free to reject the Government's suggestion").

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[11]Subsequent decisions of the Court of Claims confirm that it was the actual repossession by the United States that constituted the taking by the United States in *Turney*. See *Miller* v. *United States*, 140 F. Supp. 789, 795 (Ct. Cl. 1956); *Finks* v. *United States*, 395 F.2d 999, 1004 (Ct. Cl. 1968).

The principle of *Porter* is not limited to actions by a foreign sovereign — although the absence of an agency relationship as a matter of law is especially evident in that setting. As petitioners concede (Pet. 20 n.8), the United States likewise has been held not to be liable on a taking theory for actions undertaken by state and local governments at the request of federal officials or pursuant to federal standards (see, *e.g., D.R. Smalley & Sons, Inc.* v. *United States*, 372 F.2d 505, 507-508 (Ct. Cl. 1967); *NBH Land Co.* v. *United States*, 576 F.2d 317 (Ct. Cl. 1978); *De-Tom Enterprises, Inc.* v. *United States*, 552 F.2d 337 (Ct. Cl. 1977); *C.S. Lenoir Co.* v. *United States*, 618 F.2d 125 (Ct. Cl. 1979) (Table); *Custom Contemporary Homes, Inc.* v. *United States*, 5 Cl. Ct. 88, 90-92 (1984)), just as the United States is not liable on a contract theory for the actions of those governments (*Chas. H. Tompkins Co.* v. *United States*, 230 Ct. Cl. 754, 758-759 (1982); *G-Lam Corp.* v. *United States*, 227 Ct. Cl. 764 (1981); *Housing Corp. of America* v. *United States*, 468 F.2d 922 (Ct. Cl. 1972); *H.A. Ekelin & Associates* v. *United States*, 225 Ct. Cl. 561, 563 (1980); *Willis* v. *United States*, 224 Ct. Cl. 628, 630 (1980)).

The premise of the cases just cited is that the federal government and the state or local government that receives the federal aid under federal restrictions may structure their relationship in such a way that the acquisition of property, formation of contracts, and other measures taken in the implementation of the project are the responsibility of the state or local government. The decision to accept the aid is an independent act of the latter government, and it and the people it represents receive the direct public benefit from the project. The receipt of federal aid and the presence of federal restrictions do not render the state or local government an agent of the federal government and do not render the federal government liable for the actions of the state or

local government, including any acquisition of property necessary to carry out the project. Cf. *United States* v. *Orleans*, 425 U.S. 807 (1976). This is so even though the federal government and the Nation as a whole presumably realize some indirect or incidental benefit from the state or local project — *e.g.*, the construction of a federally assisted highway. If the result were otherwise, any person whose property was taken for a federally assisted program could elect to bring an action against the United States for just compensation under the Tucker Act, instead of seeking compensation from the state or local government that actually carried out the program.

Similar principles apply where the project involved is undertaken by a foreign government. The fact that the foreign government has received assistance from the United States or has been persuaded by the United States to embark on the project does not render the project an undertaking of the United States. The United States realizes no independent or direct benefit in those circumstances. Any benefit the United States realizes instead is incidental to and entirely derivative of those realized by the foreign government and its people — *e.g.*, the particular project may result in domestic tranquility in the foreign country, which in turn may lead to international stability and friendship and thereby to the furthering of the interests of the United States.

2. Petitioners also argue (Pet. 16-18) that the United States should be responsible for the payment of just compensation on the related theory that the agrarian reform program was in effect a "joint venture" of the Government of the United States and the Government of El Salvador. This notion, too, is an affront to the sovereignty of El Salvador, and petitioners cite no authority for requiring the United States to pay compensation in such circumstances. In fact the United States has uniformly been held *not* to be liable where the alleged taking was not by the United States,

even though it was the product of action that was formally carried out as a joint undertaking by the United States and other nations, or the United States or one of its officers formally approved action that was actually implemented by the foreign government. See, *e.g., Anglo Chinese Shipping Co.* v. *United States*, 127 F.Supp. 553 (Ct. Cl.), cert. denied, 349 U.S. 938 (1955) (United States not liable for taking effected by Japanese Government at the direction of the Allied Powers in occupied Japan, even though the United States was one of the Allied Powers)[12]; *Standard-Vacuum Oil Co.* v. *United States*, 153 F. Supp. 465 (Ct. Cl.), cert. denied, 355 U.S. 893 (1957) (same); see also *Best* v. *United States*, 292 F.2d 274 (Ct. Cl. 1961); *Huther* v. *United States*, 145 F. Supp. 916 (Ct. Cl. 1956); *Edison Sault Electric Co.* v. *United States, supra; Soucheray* v. *Corps of Engineers,* 483 F. Supp. 352, 355 (W.D. Wis. 1979).

In making their joint venture argument, petitioners principally rely (Pet. 16-17) not on cases arising under the Just Compensation Clause of the Fifth Amendment, but on cases arising under the Fourth Amendment, in which a constitutional violation has been found by virtue of the participation by federal officials in a search by officers of other governments who were not bound by Fourth Amendment standards. See, *e.g., Byars* v. *United States*, 273 U.S. 28 (1927). Those cases, however, involved participation by federal officials in conduct that itself violated constitutional standards. By contrast, the taking of property, standing alone, does not violate the Constitution. The Fifth Amendment prohibits only the taking of property by the United States without just compensation. And even when the property has been taken by the United States, the Constitution does not require the payment of compensation in advance of or contemporaneously with the taking, if a

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[12]Compare *Hirota* v. *MacArthur*, 338 U.S. 197, 198 (1949).

method is available for obtaining compensation at a later date. See, *e.g.*, *Williamson County Regional Planning Commission* v. *Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 20-21. These considerations fatally undermine petitioners' reliance on Fourth Amendment cases.

As explained above (see page 4, *supra*), there is no indication that petitioners have sought compensation from El Salvador pursuant to the land reform decree. In addition, El Salvador is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Aug. 27, 1965, 17 U.S.T. 1270, which establishes a forum for binding arbitration of such claims. In order to qualify for benefits under the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, Tit. II, 97 Stat. 384 *et seq.*, the Government of El Salvador provided written assurance that it will submit such claims to binding international arbitration pursuant to the rules of the Convention. The court of appeals in this case held that this international forum remains available and that petitioners' claim against El Salvador under international law therefore has not been extinguished (Pet. App. 16a), and petitioners have not sought review of that holding. Until petitioners have exhausted such remedies against El Salvador, it cannot be said that the expropriation of Las Lahas was accomplished without compensation even insofar as the involvement by the Government of El Salvador is concerned. Compare *Williamson County*, slip op. 20-23.

Moreover, a failure by El Salvador to make compensation clearly could not in any event be attributed to the United States and give rise to recovery under the Tucker Act for a taking by the United States without just compensation. Even if petitioners are correct that the United States encouraged and lent assistance to the land reform program — and thereby to the taking of Las Lahas — the United States cannot be held liable in this case on the theory that it

encouraged that any taking of the property of a United States citizen under that program be without compensation. Yet absent such involvement in the denial of compensation, there could be no basis for recovery from the United States. See *Williamson County Regional Planning Commission* v. *Hamilton Bank, supra.* As petitioners concede (Pet. 14), it is the firm position of the United States, embodied in statutes enacted by Congress, that foreign governments must pay compensation when property of United States' nationals is taken. That position is reflected in the provision of the Caribbean Basin Economic Recovery Act just discussed and in 22 U.S.C. 2370(e), which requires the President to suspend assistance to the government of any country if it fails to discharge its obligation under international law to provide such compensation. Petitioners' remedies therefore lie against the Government of El Salvador under its own laws or under international law. In appropriate circumstances, the Executive also may espouse the claims of United States' nationals against a foreign government and may terminate aid or resort to other diplomatic measures. But in no event does a cause of action lie against the United States for the conduct of a foreign government.[13] That result would have the undesirable consequence of excusing foreign governments from living up to their obligations to United States citizens and excusing

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[13]Petitioners also cite (Pet. 15-16, 18, 22) *YMCA* v. *United States*, 395 U.S. 85 (1969), but that decision has no relevance here. The plaintiffs in *YMCA* sought just compensation for damage done by rioters to buildings owned by the plaintiff and occupied by United States troops during riots in Panama. This Court found that no compensation was due because the Army troops were attempting to defend the plaintiff's buildings. The Court stated that "in any case where government action is causally related to private misconduct which leads to property damage * * * a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment." 395 U.S. at 93. Thus, *YMCA* concerns governmental liability for damage

United States citizens from pressing their claims against those governments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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caused by *private* conduct, not the liability of the United States for the exercise of the power of eminent domain by another sovereign.

Petitioners' reliance (Pet. 21) on *Hawaii Housing Authority* v. *Midkiff*, No. 83-141 (May 30, 1984), is likewise misplaced. The Court held in *Midkiff* that a land reform program enacted by the Hawaii legislature satisfied the "public use" requirement of the Fifth Amendment. There is no doubt that the program effectively constituted an exercise of the power of eminent domain by the State of Hawaii. Similarly, the agrarian reform program in El Salvador was an exercise of the power of eminent domain by the Government of El Salvador. Nothing in *Midkiff* suggests that liability for just compensation attaches to anyone other than the sovereign that accomplished the taking.